



Administrative Tribunal

Distr.
LIMITED

AT/DEC/593
28 June 1993

ORIGINAL: ENGLISH

ADMINISTRATIVE TRIBUNAL

Judgement No. 593

Case No. 639: QADER

Against: The Secretary-General
of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,
Composed of Mr. Jerome Ackerman, President; Mr. Samar Sen,
Vice President; Mr. Mikuin Leliel Balanda;

Whereas, on 10 December 1991, Abdul Qader, a staff member
of the United Nations Development Programme, hereinafter referred
to as UNDP, filed an application requesting the Tribunal to order:

"...

2- Relief for the mistake on my promotion
effective 11 January 1983:

(a) Rectification of the mistake (two
additional steps) as of the date the mistake has been
committed, i.e. 1 January 1983;

(b) Payment of the difference in monetary terms
as applicable to date, plus payment of interest at
the rate of the major credit cards from the effective
date of the entitlement to the present as applicable.

..."

Whereas the Respondent filed his answer on 4 December 1992;

Whereas the Applicant filed written observations on
29 January 1993;

Whereas, on 5 May 1993, the Applicant submitted an
additional statement and documents and on 10 May 1993, the
Respondent provided his comments thereon;

Whereas, on 21 May 1993, the Applicant commented on the Respondent's submission;

Whereas the facts in the case are as follows:

The Applicant, a national of Afghanistan, was locally recruited by UNDP in Afghanistan on 8 December 1973, where he served until 31 March 1978. From 22 May 1978 until 16 June 1978, he was employed by UNDP in New York, under a Special Service Agreement.

On 19 June 1978, the Applicant was recruited on a two-year fixed-term appointment at the Field Service (FS) 4, step VII level, as an Administrative Assistant, under the 100 Series of the Staff Rules. He served on further fixed-term appointments and was assigned to various field duty stations.

On 1 January 1982, the Applicant's appointment was converted from the FS-4, step X level, in the FS category, to the P-1, step X level in the Professional category. The Applicant thereby became entitled to a Personal Transitional Allowance (PTA) in the amount of \$1,464.61, which was intended to compensate for any loss in take-home pay resulting from the conversion. The Personnel Action Form dated 1 April 1982, states that the PTA would be "payable until such time as it is overtaken by adjustment of staff member's salary at the Professional level".

In a letter dated 4 May 1982, the Applicant raised with the Chief, Staff Development and Placement Section at Headquarters, the question of his conversion to the P-1 level, which, in his opinion, could not "be considered a real promotion unless it was to a higher grade." In a reply dated 17 May 1982, the Chief, Staff Development and Placement Section at Headquarters noted "that the P-1 level is the correct level for conversions from FSL-4 and there is no recourse for conversion to a higher level", since a "conversion" was "strictly a conversion from one category to another based upon actual remuneration."

On 1 January 1983, the Applicant was promoted to the P-2, step III level and his appointment became permanent. The Applicant

claims in this respect that: "Upon the receipt of the respective Personnel Action Form (...) reflecting my promotion, I discovered that the amount of PTA, an integral part of my salary, had not been included in the computation of my salary on promotion. As a result, the salary was understated, and as such, the promotion was made to P-2, step III, instead of P-2, step V." In a letter dated 6 April 1983, addressed to the Personnel Section, the Applicant sought a clarification concerning the PTA. He stated in this regard:

"... If this allowance is considered an integral part of my base pay, then it should be included in my 'Present Salary' figure when computing my salary on promotion. In which case, I should have been promoted to P.2, step V and date of next increment should read 1 February 1983 to step VI. If this allowance, however, has no bearing on promotion and it has to be overtaken through within-grade increment, then I want to know if I am still going to receive the applicable amounts on a monthly basis."

In a reply dated 26 May 1983, a Personnel Officer informed the Applicant that the Administration had amended his promotion Personnel Action Form "to include a Personal Transitional Allowance in the amount of \$1035.95 net per annum until such time as it is overtaken by adjustment of your salary at the Professional level." The Applicant thus continued to receive a PTA, in an amount of \$1,035.95 until October 1983, when it was overtaken by an adjustment of his salary.

On 1 January 1988, the Applicant was promoted to the P-3, step II level, as a Purchasing Officer and, on 1 January 1992, to the P-4, step III level.

In a letter dated 19 February 1990, the Applicant requested the Secretary-General to review the decision to grant him step III, instead of step V, on his promotion to the P-2 level in 1983. Not having received a reply, on 12 October 1990, the Applicant lodged an appeal with the Joint Appeals Board (JAB). The Board adopted

its report on 1 August 1991. Its considerations and recommendations read, in part, as follows:

"...

29. The appellant contends and the Respondent does not refute that the appellant lost two within-grade increases since his promotion to P-2, because the Personal Transitional Allowance (PTA) he received at the time of his change in status from Field Service to the Professional category was not included in his salary. (...). The Panel considered the circumstances of the appellant's change in status from FS-4/X to P-1, step 10. On the basis of the documentation available to the Panel, it found that the situation was fraught with inconsistencies. The terms 'promotion' and 'conversion' are used interchangeably by the Administration Officials of UNDP. ...

30. Although conversions and promotions are governed by different sets of rules, in both cases the pensionable remuneration of the staff member must be greater than before. It is presumably for this reason that [the Applicant] was given a Personal Transition Allowance (PTA). This additional payment, the PTA, must per force be of the same nature as the payment to which it is added. Otherwise, his pensionable remuneration would drop after the conversion/promotion, which is an unacceptable situation: a pensionable remuneration should not decrease as a result of conversion/promotion.

31. The appellant, in his letter of 6 April 1983, upon his promotion to P-2, requested an answer to the question whether the PTA was an integral part of his salary or not, but according to the files available to the Panel, he never received an answer. Nor had the Ombudsman who, in his letter of 23 June 1988 to the appellant stated: 'I will try to meet with the Division of Personnel to resolve the issue (namely whether the PTA is part of base salary) and will advise you of the outcome'.

32. The Panel considered that the situation would have been administratively more clearcut had [the Applicant] been promoted to P-2 at the time he was changed over from Field Service. The Panel realized that it is neither for the Panel nor for the appellant to determine this question, as promotion is within the prerogatives of the Secretary-General. The Panel notes however a communication from the Resident Representative, a.i. in Nigeria dated 12 May 1981, a year before UNDP changed

the appellant over to the Professional category, in which he states that the appellant performed the duties of a departing staff member at the P-4 level and recommended him strongly for promotion to P-2.

33. The Panel found unanimously that the fact that the appellant when promoted to P-2 was given step two instead of step five as should have been done, had the PTA been treated as an integral part of his salary, slowed down his career as it affected and caused him to suffer moral damage and financial loss for which he should be compensated.

V. RECOMMENDATIONS

34. The Panel unanimously recommends that:

...

(ii) the within-grade step be rectified by the addition of two steps to his present grade, effective immediately."

On 16 September 1991, the Director, Department of Administration and Management, transmitted to the Applicant a copy of the JAB's report and informed him of the decision by the Secretary-General, taken in the light of the Board's report, as follows:

"... With regard to the Board's recommendation in paragraph 34(b) of the report, it should be noted that, upon your promotion to P-2, you continued to be paid a Personal Transitional Allowance so that you received a salary higher than that corresponding to the step at the P-2 level which you were granted. It should also be noted that the methodology applied was in accordance with established practice. While the Secretary-General does not agree with the Board's position, in view of the policy of accepting unanimous recommendations of the Joint Appeals Board, he has decided to exceptionally grant you two additional steps at your present grade effective 1 September 1991."

On 10 December 1991, the Applicant filed with the Tribunal the application referred to earlier.

Whereas the Applicant's principal contentions are:

1. When the Applicant was promoted to P-2, step III, on the conversion of his status from the FS category to the Professional category, the Respondent erroneously did not include, as an integral part of his salary, the PTA the Applicant had been receiving at the time. This error in calculation resulted in a loss of two steps.

2. In accordance with the JAB recommendation that "the within grade step be rectified by the addition of two steps to his present grade, effective immediately", the Respondent should grant the two additional steps retroactively, as of the date of promotion from the P-1 to the P-2 level i.e., with effect from January 1983.

Whereas the Respondent's principal contentions are:

1. Staff rule 103.9 on "Salary policy in promotions" was correctly applied in determining the salary step to which the Applicant was assigned upon promotion.

2. Recommendations of the JAB may be appraised by the Respondent, whose decision in this case was a reasonable exercise of discretion.

The Tribunal, having deliberated from 11 June to 28 June 1993, now pronounces the following judgement:

- I. The JAB made an unanimous recommendation that the Applicant's within-grade step be rectified by the addition of two steps to his present grade, effective immediately.

The Applicant claims that it means that the relief suggested by the Joint Appeals Board (JAB) has to be made retroactive from 1 January 1983, when he was promoted; in his view, no other interpretation is valid if he is to be compensated for all the hardships he claims he suffered. The Respondent decided that while he did "not agree with the Board's position, in view of the policy of accepting unanimous recommendations of the Joint Appeals Board,

he has decided to exceptionally grant you two additional steps at your present grade effective 1 September 1991".

II. The Tribunal notes that until 1984, the main concern of the Applicant was whether the Personal Transitional Allowance (PTA) granted to him on conversion/promotion would be continued and, if so, for how long and in what amount. There is evidence showing that during this period, the Applicant clearly understood how the PTA operated. In a letter of 26 May 1983, a Personnel Officer told the Applicant that his P-5 Personnel Action Form had been amended to include a PTA in the amount of \$1,035.95 per annum (reduced from an earlier amount of \$1,464.61 through absorption by increment in his current grade) "until such time as it is overtaken by adjustment of his salary in the Professional level". Thus, the Tribunal finds that prior to 1984, the Applicant should have known that the PTA was not considered an integral part of his salary and that he was not receiving a two-step increase in his grade level.

III. On 15 May 1984, about a year later, the Applicant wrote to the Chief, Division of South Africa of the UNDP Regional Bureau, stating that his PTA had been stopped since November 1983. This would imply that, as late as 15 May 1984, his contention was that he was entitled to receive a PTA but was not receiving it, for, in his view, it had not been overtaken by adjustment of his salary at the Professional level. There was apparently no reply to the Applicant's letter of 15 May 1984; there should have been some response, even as a matter of courtesy.

IV. It was not until 1987, when he sought the assistance of the UNDP Ombudsman, that the Applicant clearly raised the issue of his being improperly denied two steps in his 1983 promotion. He received no substantive reply to his representations. He continued to press his claim, first with the Respondent and later before the JAB for what he considered to be the proper level to which he thought he should have been promoted on 1 January 1983.

V. The JAB discussed all the aspects of the case. The Applicant quotes, with approval, the JAB's analysis and recommendations which the Respondent accepted, seemingly with some hesitation and exceptionally. The Respondent views the JAB's recommendation that the Applicant's within-grade step be rectified by addition of two steps to his present grade, effective immediately, as being "unambiguous": "the clear meaning of the word 'present' is 'current' and cannot mean what the Applicant contends".

VI. The Tribunal has considered carefully the wording of the JAB's recommendation and the reasons leading to it. It takes the view that the JAB meant that the 2-step advancement should be made on the present grade of the Applicant and should be given immediate effect. The Applicant's interpretation - that the JAB intended retroactive effect from 1983 - is unsupported. The Tribunal considers, therefore, that the JAB was of the view that its recommendation, if accepted, would provide adequate compensation for any losses the Applicant might have suffered. The Tribunal finds no ground for disagreeing with the JAB on this point. The Respondent's interpretation of the JAB's recommendation was correct and his willingness to adopt it constituted fair treatment of the Applicant.

VII. The Tribunal, finally, takes the view that much delay and difficulty in this case could have been avoided if a clear, detailed and timely statement on "methodology applied in accordance with the established practice" could have been made in response to the many communications from the Applicant. Such a statement would have eliminated much of the inference, deduction and speculation which characterize this case.

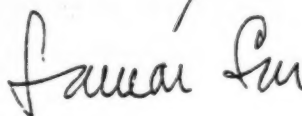
VIII. In view of the foregoing, the application is rejected.

(Signatures)

Jerome ACKERMAN
President



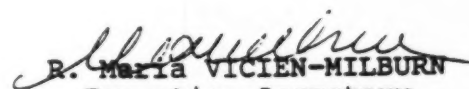
Samar SEN
Vice-President



Mikuin Leliel BALANDA
Member



Geneva, 28 June 1993



R. Maria VICIEN-MILBURN
Executive Secretary